No. 15,053

In The

United States Court of Appeals For the Ninth Circuit

ALBERT LLOYD ANDERSEN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S ANSWERING BRIEF

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STATEMENT OF THE CASE

A jury returned a verdict finding appellant guilty on both counts of the following indictment:

"THE GRAND JURY CHARGES:

COUNT I

That on or about the 1st day of August, 1955, ALBERT LLOYD ANDERSEN, defendant named above, at Las Vegas, State and District of Nevada, did unlawfully and knowingly photograph, and print the likeness of, a genuine Fifty Dollar ($50.00) United States Federal Reserve Note, Serial Number BO 30 12622A, Federal Reserve Bank of New York, face plate No. 17, Check Letter D, Series of 1950, in violation of Title 18, Section 474, United States Code.

COUNT II

That on or about the 1st day of August, 1955, ALBERT LLOYD ANDERSEN, defendant named above, at Las Vegas, State and District of Nevada, did unlawfully and knowingly photograph, and print

the likeness of, a genuine Twenty Dollar ($20.00) United States Federal Reserve Note, Serial Number B12959821 B, Federal Reserve Bank of New York, Series of 1950A, in violation of Title 18, Section 474, United States Code."

For a more orderly presentation, the factual summary and testimony, as it relates to the various assignments of error, will be incorporated in the argument.

ARGUMENT

I

THE DENIAL OF APPELLANT'S MOTION TO SUPPRESS THE EVIDENCE AND THE SUBSEQUENT ADMISSION OF THE PHOTOGRAPHIC PRINTS AND NEGATIVES OF UNITED STATES TREASURY NOTES IN EVIDENCE WAS PROPER, AND DID NOT VIOLATE APPELLANT'S RIGHTS UNDER THE FOURTH AND FIFTH AMENDMENTS.

Appellant assigns as error failure of the trial court, upon motion, to suppress certain evidence discovered and seized by local police officers during the search of appellant's office suite. The warrant of arrest and the warrant of search were issued out of the local State justice court, and were both unrelated to the federal charge upon which appellant was convicted.

Appellant first contends that the evidence was not admissible for the reason that federal officers cooperated in the seizure and removal of the evidence.

" * * * . Generally speaking, in federal courts State officers are considered as strangers as far as the use of evidence procured by search and seizure is concerned; and although search and seizure by State

officers may be illegal, if made entirely independent of any cooperation with federal officers, the evidence seized is usually admissible in the federal courts. 20 Am. Jur., Evidence, Sec. 397."

—United States v. Haywood
208 F. 2d 156 (7CA. 1953), at page 158.

Before discussing the authorities on this issue a review of the pertinent testimony is necessary. First, by way of summary: On September 22, 1955, at approximately 4:00 P.M. Jack D. Ruggles and Herbert L. Barrett, police offiicers of the Las Vegas, Nevada, Police Department, armed with both a warrant of arrest and a warrant of Search issued out of a local state court, entered upon appellant's office premises, consisting of five small rooms, at 114 North Third Street, Las Vegas, Nevada. Appellant was shown the warrant of arrest and was placed under arrest. He was then shown the search warrant, and thereafter the officers commenced the search of appellant's premises. During the course of the search, Officer Barrett came upon evidence, consisting of a plastic bag containing photographic prints of U. S. Treasury Notes, which did not relate to the purpose of the search. Officer Ruggles then requested appellant to unlock the dark room. Appellant complied. In this room were found miscellaneous photographic equipment (T. Vol. 1, Pg. 88, line 221), including chemicals ("chemicals" are enumerated in the search warrant, appellant's Exhibit "A"), and an overnight bag containing certain photographic prints and negatives of $20.00 and $50.00 U. S. Treasury notes, also the subject of the motion to suppress. Sometime thereafter the two officers gathered up the evidence.

At approximately 6:00 P.M., Officer Ruggles, realizing there was no United States Treasury Agent stationed in Las Vegas, called to the local office of the Federal Bureau of Investigation, and asked that an agent come over. Shortly thereafter Special Agents Bryon C. Wheeler and W. Albert Stewart came upon the premises. Neither of the agents

participated in the search or the seizure, nor did they give any instructions to the police officers except to state that the matter was out of their jurisdiction and that they would furnish the telephone number of the Treasury Agent in Los Angeles. The federal agents were in the appellant's office not more than five minutes. Thereafter, the evidence was removed by the police officers to the Las Vegas Police Department where it was tagged by Officer Barrett.

The testimony of Police Officer Ruggles and Special Agents Wheeler and Stewart of the Federal Bureau of Investigation, as it applies to this issue, follows:

Testimony of Jack D. Ruggles, Sergeant, Las Vegas Police Department, on examination by appellee, pg. 53, lines 5 through 9.

Q. For what purpose were you upon the premises at that time?

A. I had in my possession a warrant of arrest for Dr. Andersen. I also had in my possession a warrant to search the premises of his office.

Pg. 70, line 14 through pg. 71, line 6.

COURT: What was the charge contained in the warrant under which you arrested the defendant?

A. Grand larceny.

COURT: Based upon a complaint filed where?

A. With our local Police Department.

COURT: Nothing in the Federal Court at all?

A. No, sir.

COURT: And did any Federal Officers know you were going to make this arrest?

A. No, sir.

COURT: Had you conferred with any Federal Officers about this defendant before you made any arrest?

A. No, sir.

COURT: Had any member, had your associate, or the officer who accompanied you, Mr. Barrett, had he conferred with, do you know if he conferred with any Federal Officers?

A. Mr. Barrett didn't know I was going to make the arrest until ten minutes prior to the arrest.

On Cross Examination by appellant, Pg. 79, line 10 through Pg. 80, line 24.

Q. Is it not a fact, Mr. Ruggles, that when Mr. Barrett brought these bills to you that you then picked up the telephone in the office and phoned a federal agent?

A. After we had gathered up the evidence and were ready to go the thought occurred that there was no Secret Service man in this town, so I phoned the FBI and asked them to step over to the office due to the fact it was right next door. * * *

COURT: Next door to what?

A. Next door to their office. It was the next building over.

COURT: To what office?

A. The FBI office is right around the corner. Dr. Andersen's office is in the building north of the FBI office. I asked them to step over, that I wanted to inquire of them how to contact the nearest Secret Service agent, or whether or not, if they could— — —

COURT: Tell me what they did?

A. They came to the office.

COURT: To Dr. Andersen's office?

A. Yes, they did.

* * * * * * *

COURT: As a result of this you took these with you?

A. Well, I already had it ready to go.

COURT: It don't look too good.

MR. MORGALI: That's right, your Honor. That is what I am trying to bring out.

A. These FBI agents told me they had no authority in the case and referred me to Agent Spaman, in Los Angeles.

Q. Is it not a fact you phoned the FBI when Sergeant Barrett first brought you one or two of the bills?

A. No, it is not a fact.

Q. And, is it not a fact you phoned the FBI for instructions as to what to do.

A. The FBI gave me no instructions and they told me they had no authority whatsoever, and they gave me no assistance whatsoever, and turned around and walked out.

* * * * * * *

Pg. 85, line 12 through Pg. 86, line 15:

COURT: * * * * * I think it would be just as well for you now, before we go any further, to just state what you did in connection with the members of the Federal Bureau of Investigation. Explain how they happened to be there and what was said and done. Will you please?

A. I remember Agent Wheeler as one of the agents. The other gentleman I don't remember what his name is. It was after their working hours and I didn't expect them to be in when I called, but Agent Wheeler was there and I told him that I was in a building north of him and I asked him if he could step over before he went home and he said he would be right over. At the time we had, I believe, all of the evidence that we could carry stacked ready to go and they walked in and I pointed out what I had and he said 'it looks like someone has been photographing money.' I inquired if they

had any jurisdiction, due to the fact that there was no treasury agent in this locality, and could they assist me with the federal offense that apparently had been committed, and they promptly told me that they had no jurisdiction in the matter. They referred me to Agent Spaman in Los Angeles. In fact, I believe they gave me his phone number, which I didn't have prior to that time. They did see some of the evidence. They identified themselves to Dr. Andersen. They didn't question Dr. Andersen any. They may have asked him who he was, but they soon left. They didn't make any search, nor did they seize any evidence, nor did they order me to seize any.

Pg. 87, Line 22 through Pg. 89, line 7:

A. * * * * In the meantime I told Barrett to search the entire office premises for the articles listed on the search warrant and he began searching. It was not long until Detective Barrett asked me to come into the other room. I left Dr. Andersen and went into the other room and he pointed out a plastic bag full of these notes and these printed up bills.

COURT: Such as in these exhibits?

A. Yes, sir. I took it in and confronted Dr. Andersen with it and asked him where he had obtained it and he said he had been photographing money and transferring the photograph onto the money, which was his hobby, and I told him I didn't think it was legal as a hobby or any other respect to photograph money, so I ordered Detective Barrett to further search the premises for any kind of equipment that he might use to make these photographs with, in addition to the things listed on the original warrant, and Detective Barrett stated there was a room back there that had three or four

different locks on it and he couldn't get in. I requested Dr. Andersen to unlock it and he took out a set of keys and started to unlock it. He unlocked each of the locks and when when the locks were off it was a dark room approximately four feet by four feet. It had a phone, a developing tray, all sorts of chemicals and things photographers would use. There was a large portrait camera. That was not in the dark room . It was on a table outside the dark room. Most of the stuff was in the room on the west side of the office. So we gathered up—we also found in the dark room, as I remember, a small overnight bag or suitcase and we took it out and opened it and it had a leather case with several different compartments and in these compartments we found these negatives and bills that looked much better than the ones in the plastic bag .* * * * .

Testimony of Bryon C. Wheeler, Special Agent, Federal Bureau of Investigation, on examination by appellant on motion to suppress, Pg. 128, line 1 through Pg. 130, line 9:

Q. On September 22, 1955, did you have occasion to go in the building at 114 North 3rd Street, Las Vegas, Nevada?

A. I did.

Q. Under what circumstances?

A. Detective Ruggles of the Las Vegas Police Department called my office shortly before 6:00 o'clock on that date and stated that he had something at the office of Dr. Andersen that would possibly be of interest to us, and asked us to come over. I, together with Special Agent, W. Albert Stewart, proceeded to the office of Dr. Andersen. Upon entering the office we were introduced to Dr. Andersen by Mr. Ruggles, and Mr. Ruggles then showed us some photographed currency, what appeared to be photographed currency on the desk.

Q. On which desk? Which room? Do you remember?

A. It was in the inner room as you are going through the door. I suppose it was the doctor's private office. It appeared to be. And he showed us this money — this photographed money. I then talked to Detective Ruggles — took him out to the outer office and told him that the FBI had no jurisdiction in this matter and that he should refer it to the Secret Service.

Q. Did you examine any of these prints at that time, as are shown on Prosecution Exhibit 1 for identification?

A. Not that I recall.

Q. Did you have any conversation with Dr. Andersen concerning the clarity of the print, or anything like that?

A. No.

Q. How many — strike that. You stated you told Mr. Ruggles to refer the matter to the Treasury Agent?

A. Yes. As a matter of fact I told Detective Ruggles that upon my arrival at my office I would attempt to obtain the telephone number of the Secret Service in Los Angeles, and subsequent to my departing from the office — from Dr. Andersen's office — I obtained that number and called Detective Ruggles back. We were in the office of Dr. Andersen for approximately four or five minutes.

Q. Did you tell him to do anything with the prints?

A. I gave him no instructions regarding those bills.

Q. Did you tell him to take the notes along with him to the police station?

A. No. I didn't. No, I did not.

Q. Mr. Wheeler, did you see a plastic bag containing bills, or parcels of bills at any time?

A. I don't recall. I don't recall. I can't recall at the time whether I did or not.

Q. How many bills were spread upon the desk?

A. That would be difficult to estimate. I don't know. There were several. There was quite a small pile of them.

Q. That is all. Oh, just one moment. When you left the office did you have any understanding that the matter would be referred to the Treasury Agents?

A. No, we did not. I simply told Detective Ruggles that it should be referred to them; that they would probably be interested in the matter.

Testimony of W. Albert Stewart, Special Agent, Federal Bureau of Investigation, on examination by appellant on motion to suppress; Pg. 131, line 17, through Pg. 133, line 8:

Q. On the evening of September 2, 1955, did you have occasion to go to the building at 114 North 3rd Street?

A. Did you say September 2nd?

Q. September 22nd.

A. Yes, sir.

Q. About what time of the day?

A. It was approximately six o'clock, P.M.

Q. Under what circumstances?

A. I was in my office at 300 Fremont Street with Agent Wheeler. We received a telephone call from Detective Ruggles, who stated that he was in an office in an adjoining building and thought he might have something we would be interested in and asked if we would come right over. We stated we would, and did go right over to an office in an adjoining building. When we arrived I observed a pile of what appeared to me to be photographs of money lying on a table. Agent Wheeler and myself both advised Detective Ruggles that this was something over which we had no jurisdiction; that it was a matter for the Secret Service. Then we retired from the office.

Q. How long were you in the office, approximately?

A. Not more than five minutes.

Q. I show you Prosecution Exhibit 1 for identification and ask you while you were in the office if you examined any prints, such as are shown on Prosecution Exhibit 1 for identification? (Exhibit handed to witness.)

A. This appears similar to something I saw on the desk. I did not make any minute examination of it.

Q. Who received the telephone call from Detective Ruggles?

A. Agent Wheeler.

Q. What conversation did you have with Detective Ruggles before you left the office?

A. I merely stated to Detective Ruggles that this was something not within our jurisdiction.

Q. Was there any conversation had concerning the Treasury Agent? The United States Treasury Agent?

A. I believe Agent Wheeler, in my presence, stated to Detective Ruggles that he would obtain the telephone number and name of the Secret Service agent in Los Angeles, and would call it back to him.

The testimony of the state and federal officers, indicates clearly that the state officers were acting independently of the federal government in the search, and that there was no participation by the federal agents in either the search or the seizure.

In the Ninth Circuit case of *Brown v. United States,* 12 F. 2d 926 (CA9, 1926), a federal prohibition officer informed a member of the local police force that an automobile load of intoxicating liquor was to be delivered that evening at a certain house. The police officer answered that he knew of the place and that he had a search warrant

for it. Thereafter two police officers in one car and three prohibition officers in another went to the place, and in the vicinity thereof stationed themselves and waited until an automobile was driven into the garage and lights were turned on in the house. Some twenty minutes later the police officers entered the house and discovered a large quantity of liquors. *Being informed of this discovery, the prohibition officers entered and assisted the police officers in removing the liquors.* (Italics supplied).

It was contended that the search and seizure were illegal, by reason of participation by the federal officers.

The Ninth Circuit, in answering this contention, held:

> "The court below, to whom the case was submitted for decision, a jury having been waived, expressly found that there was no such agreement or understanding, but that, on the contrary, the evidence was that the police officers on their own initiative had procured a search warrant under the state law to search the house before the federal officers conferred with them. The federal officers, so far as the evidence goes, had in mind the seizure of a load of liquor to be delivered at that house. They took no part in the search, and the search was not made under their authority. We think the evidence so obtained was clearly admissible. (Citing cases)."

It should be noted that while the State of Nevada has no specific statute prohibiting the making of photographs and prints of United States obligations in the likeness thereof, there is a state criminal statute prohibiting counterfeiting in the following language:

> "Every person who shall counterfeit any of the species of gold or silver or paper money now current or that shall hereafter be current in this state, ... , shall be deemed guilty of counterfeiting, ... "
> —Nevada Compiled Laws, 1929, Vol. 5, Sec. 10364.

The Tenth Circuit, in the case of *United States v. Butler,* et al., 156 F. 2d 897 (10 Cir., 1946), has well summarized and reviewed the federal decisions wherein state officers were involved in the search and seizure of evidence later used for federal prosecution.

" * * * . It has been held without deviation over a long period of time that evidence obtained through wrongful search and seizure by state officers, acting independently of the federal government, and not in the presence of nor with the participation of federal officers, is admissible in a prosecution in a United States Court, even though the property seized was by the State officers delivered to federal authorities for the purpose of being used as evidence in connection with the prosecution. *Burdeau v. McDowell,* 256 U. S. 465, 41 S. Ct. 574, 65 L. Ed. 1048, 13 A.L.R. 1159; *Feldman v. United States,* 322 U. S. 487, 64 S. Ct. 1082, 88 L. Ed. 1408; *Sloane v. United States,* 10 Cir., 47 F. 2d 889; *Aldridge v. United States,* 10 Cir., 67 F. 2d 956; *Edgmon v. United States,* 10 Cir., 87 F. 2d 13; *Taylor v. Hudspeth,* 10 Cir., 113 F. 2d 825; *Ruhl v. United States,* 10 Cir., 148 F. 2d 173; *Butler v. United States,* 10 Cir., 153 F. 2d 993.

"But evidence obtained through such a search and seizure by state officers in cooperation with federal officers, or in the presence of federal officers, should be suppressed when seasonably challenged in an appropriate manner. *Byars v. United States,* 273 U. S. 28, 47 S. Ct. 248, 71 L. Ed. 520. Similarly, where state and federal officers have a general understanding and common practice that the latter may adopt and prosecute in the federal courts offenses which the former discover in the course of their operations, and a prosecution which originated by an unlawful search and seizure by state officers is adopted, the evidence obtained as the result of the search and seizure is to be suppressed in like manner as though the search and seizure had been made by federal officers. *Fowler v. United States,* 7 Cir., 62 F. 2d 656; *Sutherland v. United States,* 4 Cir., 92 F. 2d 305; *Lowrey v. United States,* 8 Cir., 128 F. 2d 477. And where state officers obtain evidence through means of an unlawful search and seizure, not made under any pretense of enforcing state law but solely in behalf of the United States for the intended purpose of criminal prosecution, it is open to suppression by appropriate proceeding timely taken. *Gambino v.*

United States, 275 U. S. 310, 48 S. Ct. 137, 72 L. Ed. 293, 52 A.L.R. 1381; *Aldridge v. United States,* supra; *Edgmon v. United States,* supra."

Appellant relies upon the decisions of *Byars v. United States,* 273 U. S. 28, and *Lustig v. United States,* 338 U. S. 74, to support his contention that the federal officers became a cooperative agency in the search and seizure in question. Factually, however, these two cases are readily distinguished from the case at bar. In the *Byars* case, a state search warrant was obtained to direct a search for intoxicating liquors and instruments and materials used in the manufacture of such liquors. A federal agent was asked to accompany the state officer, which he did, and participated with the state officer in the search and seizure of the contraband. In the *Lustig* case, the federal treasury agent had knowledge of the proposed search by local police officers to determine the activities of the defendant. The federal agent was not present during the initial search by the police officers but was present when the defendant and his companion returned to their room at which time the two were arrested and searched by the city police and the articles evidencing counterfeiting of currency were turned over to the federal agent at that time, following his examination and selection of the evidence.

In the instant case the evidence in question was found during a valid search by local police officers. At the conclusion of the search the two federal agents were called to the place of search. Those officers did not participate in any search; they did not seize the evidence nor did they direct the local officers in any function other than to give the telephone number of an interested federal agency. To spell federal participation under these facts would require redefinition of the words "participate" and "cooperate". As stated in the *Lustig* case, supra, "It is immaterial whether a federal agent originated the idea or joined

in it while the search was in progress. So long as he was in it before the object of the search was completely accomplished, he must be deemed to have participated in it."

In the case under consideration the federal agents did not join in the search nor were they in it before the search was completely accomplished. The local police officers had completed the search and had taken possession and seized the evidence before the call was made to the federal officers. The object of the search was completely accomplished.

Appellant asserts, on page 15 of his opening brief, that where state and federal officers have a general understanding and common practice, the latter may adopt and prosecute in the federal courts, offenses which the former discover in the course of their operations, citing inter alia, *Lowrey v. United States,* 128 F. 2d 477 (CA 8, 1947) and *Fowler v. United States,* 62 F. 2d 656 (CA7, 1932) in support of this proposition.

In the *Lowrey* case, supra, the search and seizure was made by state officers, under color of a state search warrant, the invalidity of which was conceded by the government; the state officers discovered distilled spirits without the stamp required by law. The defendant could have been prosecuted in either state or federal court. The evidence disclosed that there was a general understanding between the state and federal officers that in cases of this nature prosecution would be tendered to federal authorities "in which the federal officers, with full understanding, gave their willing cooperation."

In suppressing the evidence seized, the Court said:

> "It is true that evidence obtained by state officers, acting entirely upon their own account and without participation or cooperation of federal officers, is admissible in prosecutions by the federal government.

(Case cited). But it is also held that where the state and federal officers have the understanding and operate under the practice revealed by the evidence in this case, under which the prosecution of the offender is invariably tendered to the federal officers and by them accepted if the offense is considered of sufficient importance, the evidence obtained in the course of the unlawful search by state officers must be excluded. *Sutherland v. United States* 4 Cir., 92, F. 2d 305; *Byars v. United States,* supra; *Gambino v. United States,* 275 U. S. 310; *Fowler v. United States,* 7 Cir., 62 F. 2d 656; *Ward v. United States,* 5 Cir., 96 F. 2d 189."

And in the *Fowler* case, supra, the Court said at page 657:

"This long-time definite understanding and practice between the police and the federal prohibition department tends strongly to indicate a delegation to the police of federal authority for making the very seizures which the federal officers stood ready to take over and prosecute as their own if only the raid yielded a sufficient quantity of liquor to make it seem worthy of federal prosecution. At any rate, the federal taking over of the prosecution in accordance with such long existing understanding and practice can be deemed a ratification by the federal authority of the means whereby the contemplated search and seizures were undertaken and made. * * * "

The record in the case under consideration is void of any evidence or proof that there was any understanding or practice existing between the police department and any federal agency in the prosecution of this type of case or any case involving federal jurisdiction.

Appellant further asserts (page 18 of his opening brief) that the seizure of the evidence was made for the sole purpose of aiding in the prosecution of a federal offense, and therefore must be excluded. The record seems clear that the local officers, during the course of a valid search upon the premises of appellant, came upon the evidence which indicated to them a violation of a federal law. Pursuing their search into the locked dark room would not make them agents of any federal

agency, for they had the clear right and duty to continue their search, under the state warrant, to its conclusion regardless of what might or might not be found.

In the case of *United States v. Valisio,* 41 F. 2d 294 (D. C. N. Y., 1930) cited by appellant (Pg. 19, Opening Brief), the state officer made a search of the truck without a warrant and before the arrest of the defendant. Upon discovery of the contraband, the officer made the arrest for violation of the applicable federal statute. Motion to suppress the evidence was granted. This case is readily distinguishable from the case at bar, in that appellant was first placed under arrest before the search, under a state warrant, was commenced. The police officers were upon the premises acting on behalf of the State, and not as agents interested in the violation of a federal offense.

And in the case of *Gambino v. United States,* 275 U. S. 310 (1927), the testimony reflected and the court so held that the state troopers, in the search and seizure, acted without probable cause, and solely on behalf of the United States; accordingly, the evidence seized was excluded.

The appellant suggests that the search was general and exploratory. On the contrary, the search warrant (Appellant's Exhibit "A") specifically enumerates certain stolen personal property believed to be upon the premises in question. Certainly, this was no lawless invasion of the premises and a general exploratory search in the hope that evidence of crime might be found.

In the case of *United States v. Lefkowitz,* 285 U. S. 452 (1932), the Court said at page 465:

"The decisions of this Court distinguish searches of one's house, office, papers or effects merely to get evidence to convict him of crime, from searches such as those made to find stolen goods for return to the owner, * * * ."

It should be of no significance that the photo-prints and negatives seized were unrelated to the crime for which the warrant of search was directed.

In *Harris v. United States,* 331 U. S. 145 (1947), federal agents arrested the accused and without a search warrant searched his apartment for five hours for two cancelled checks and other means by which the crimes charged might have been committed. In an envelope they discovered a sealed envelope marked "personal papers" of the accused. This was opened and found to contain several draft cards which were the property of the United States, the possession of which was a federal offense. The accused was later convicted of violations of the Selective Training and Service Act upon the evidence obtained, and which was unrelated to the crime for which he was originally arrested. The Court held it not to be "a significant consideration that the draft cards which were seized were not related to the crimes for which the petitioner was arrested." The Court went on to say that in "keeping the draft cards in his custody petitioner was guilty of a serious and continuing offense against the laws of the United States." While the evidence seized in the instant case might not be considered a continuing offense against appellant, a cursory examination by the police offiers immediately revealed to them that a crime had been committed, and that the property was evidence of that crime. Certainly there can be no distinction which would allow seizure in one case and not in the other. It must also be remembered that the search of appellant's office was made pursuant to a warrant of search, and that when the evidence in this case was discovered

the search did not terminate. Further, in the *Harris* case, supra, the search was conducted by federal officers as contrasted with the instant case where the search was by state officers.

II

THE COURT PROPERLY EXERCISED ITS DISCRETION IN RULING ON THE MANNER IN WHICH EXPERT TESTIMONY, RELATING TO THE MENTAL CONDITION OF THE APPELLANT, BE PRESENTED.

Appellant assigns error of the court "in refusing to permit experts to testify as to appellant's mental condition unless they heard the evidence bearing on that subject which was given in open court."

> "The general rule that matters pertaining to the examination of witnesses rests largely within the discretion of the trial court, applies in the case of skilled or expert witnesses who testify as to matters of opinion. * * * "
>
> —32 C. J. S., Evidence, Sec. 549, Pg. 343.

When the defense of insanity arose in the progress of the trial, appellant's counsel informed the court that appellant would be on the witness stand testifying as to his mental condition the entire afternoon, or approximately two and one-half hours, and that Dr. James H. Swartzfager would thereafter be called as an expert witness, to testify as to the mental condition of appellant, by means of a hypothetical question, (T. Vol. 2, Pg. 349).

The following colloquy took place, (T. Vol. 3, Pg. 354):

"COURT: In other words, you propose to keep this man (appellant) on the stand all afternoon, and then you are going to embody another afternoon so some doctor can sit here on the witness stand and listen to it. Is that what you are going to do?

Mr. Morgali: Yes.

COURT: It is going to take quite a while to propound that hypothetical question?

Mr. Morgali: Maybe ten or fifteen minutes, maybe more."

The court later recessed at 2:30 P.M., to allow appellant to have his medical experts in court the following morning to hear the testimony of the appellant upon this issue, (T. Vol. 3, Pg. 363).

It is evident that the court was of the view, and properly so, that the proposed hypothetical question, based upon an afternoon session discourse by the appellant, would be a tedious and useless question, and by the very nature of its length, would tend to confuse rather than be of any aid to the jury in determining the mental condition of the appellant. The testimony of appellant on this issue covered fifty-eight pages of transcribed testimony, (T. Pages 365 through 423).

Wigmore on Evidence, Third Edition, Vol. II, Sec. 685, has this to say on the length of a hypothetical question:

> "On principle, the questioner is entitled (as already noted) to obtain an opinion upon any combination of facts, however few or however numerous. Hence, the mere length of a question of itself is no objection. But, for the same reasons of policy as before, the Court may exclude a question which by its length tends to confuse or mislead the jury without being of appreciable service. This discretion of the trial judge ought to be absolute, and should have been exercised much more frequently than it is in excluding tedious and useless questions."

In *Davis v. Traveler's Ins. Co.,* 52 Pac. 67, (Kan. 1898) the court said:

" * * * * We know that, in order to the formation of a satisfactory opinion by a medical expert, all pertinent facts from which a generalization can be drawn should be stated, and also that the length of a hypothetical question is very largely in the discretion of the court trying the case (citing cases); but we think it may be extended to such a great length, and be burdened with such prolixity of detail, as to be confusing, rather than enlightening, to the jurors at least, and thus obscure in their minds the essential facts upon which the diagnosis is based. * * * * "

Jones on Evidence, Fourth Edition, Sec. 374, pg. 702, discusses the procedure adopted by the Court in the instant case:

" * * * But it is not necessary in all cases to recapitulate in hypothetical form the facts which are alleged to have been established, and which are assumed as the basis for the experts opinion. Thus, if the expert has heard a deposition read, or has heard the testimony of a witness or even of several witnesses in which no conflict appears, and the testimony is not voluminous, he may give an opinion based on the assumption that such evidence is true; and where there is no conflict as to the material facts, the question need not be hypothetical in form. The witness is allowed to give an opinion from the evidence in such a case upon the ground that, by the terms of the question, he is required to assume that the facts given in testimony are true; and he is not required to draw any other conclusions or inferences as to the facts."

III

THE COURT'S INSANITY INSTRUCTION WAS PROPER

The appellant's third and fourth assignments of error concerns the Court's instruction on insanity and its refusal to give appellant's requested instruction, suggested by the case of *Durham v. United States* (D. C. Cir., 1954) 214 F. 2d 862.

The Court instructed the jury as follows (Record Pg. 37):

"In order for insanity to be a legal defense to the commission of a crime there must be:

(a) Such a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and wrong; or

(b) He must be unconscious and unaware of the nature of the act at the time he is committing it; or

(c) Where, though conscious of it and able to distinguish between right and wrong and know that the act is wrong, yet his will, or the governing power of his mind, has been otherwise than voluntarily, so completely destroyed that his actions are not subject to it, but are beyond his control."

This instruction follows the language laid down by the Supreme Court in the case of *Davis v. United States* (1896), 165 U. S. 375, which has been cited with apparent approval by that Court in the cases of *Matheson v. United States* (1913), 227 U. S. 540, 543, and *Fisher v. United States* (1945), 328 U. S. 463, 466.

While the case of *Durham v. United States,* supra, modifies the test of criminal responsibility and departs from the rule announced in the case of *Davis v. United States,* supra, the appellee suggests that the very recent decision in the Fifth Circuit, *Howard v. United States,* 24 L.W. 2498, decided April 20, 1956, should be persuasive in determining this issue. In adhering to the rule established by the Supreme Court, that Court said:

"In the face of such recognition by the Supreme Court of a test of criminal responsibility, we do not feel at liberty to consider and decide whether, in our opinion, the recent modification of such test in the District of Columbia (*Durham v. United States,* D. C. Cir., 214 F. 2d 862) is sound or unsound, nor whether some other test should be adopted. This Circuit follows the law as stated by the Supreme Court and leaves any need for modification thereof to that Court, while the District of Columbia Circuit is entrusted with a considerable degree of autonomy with respect to law enforcement in the District. We, therefore, leave unchanged the test of criminal responsibility as thus established. * * * "

CONCLUSION

It is the earnest contention of appellee that the court's denial of appellant's motion to suppress the evidence was proper, and that the assignments of error raised by appellant are without merit. The judgment of conviction should be affirmed.

Respectfully submitted,
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Dated: June 8, 1956.